

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>PAUL D. MARTINITZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,224
<b>MARTIN MARIETTA AGGREGATES</b>	)	
Respondent	)	
AND	)	
	)	
<b>CIGNA</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the Award dated January 30, 1997, entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument on July 15, 1997.

**APPEARANCES**

Frederick J. Patton, II, of Topeka, Kansas, appeared for the claimant. Gary R. Terrill of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

### ISSUES

The Special Administrative Law Judge found a 32 percent task loss and, after imputing a post-injury average weekly wage, found a 53 percent difference in pre- and post-injury average weekly wage. Averaging those percentages, the Special Administrative Law Judge awarded claimant benefits for a 42 percent permanent partial general disability. The only issue before the Appeals Board on this review is the nature and extent of claimant's injury and disability.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be modified.

The parties stipulated claimant injured his back while working for the respondent on or about August 29, 1994. At the time of the accident, claimant had worked as a heavy equipment operator at the quarry for the respondent and its predecessor for over 16 years. Claimant underwent conservative treatment and was ultimately released to return to work with restrictions in May 1995. Unable to provide claimant a job due to his permanent work restrictions, respondent terminated claimant effective October 14, 1996. Claimant is not presently seeking employment as he is receiving social security disability benefits.

Because of severe ongoing pain, claimant contends he is entitled to an award of permanent total disability benefits. In support of that position, claimant cites such factors as his age (early 60s), his 11th-grade education, the lack of a GED, the lack of other education or training, and the alleged inability to perform the type of work he previously performed.

As indicated by the various medical opinions introduced into evidence, there is a wide divergence of opinion whether claimant is able to work. Board-certified orthopedic surgeon Robert L. Eyster, M.D., saw claimant four times between September 21 and December 1, 1994. He testified on behalf of the respondent. He diagnosed degenerative disc disease of the lumbar spine which constituted a 5 percent whole body functional impairment according to the AMA Guides. He believed claimant could return to work as long as he did not repetitively lift greater than 35 pounds or bend or twist greater than 15 times an hour. After reviewing a list of work tasks which claimant performed during the 15-year period before the August 1994 accident as prepared by respondent's vocational expert, Richard Santner, Dr. Eyster testified he believed claimant could perform all nine of the listed tasks, if he were careful.

At the other extreme, Daniel D. Zimmerman, M.D., testified on behalf of claimant. Dr. Zimmerman examined claimant in June 1995 at claimant's attorney's request. He

testified claimant had a 27 percent whole body functional impairment due to his back condition according to the AMA Guides. He also testified that claimant should be restricted from occasional lifting greater than 20 pounds, frequent lifting greater than 10 pounds, and that claimant should avoid frequent bending, stooping, squatting, crawling, and kneeling. He believed claimant should also be restricted from sitting for prolonged periods.

After reviewing a list of work tasks compiled by claimant, Dr. Zimmerman indicated claimant was unable to perform any of those tasks.

Although his deposition was not taken, the medical report of Peter V. Bieri, M.D., was part of the evidentiary record for purposes of final award. Dr. Bieri began his role in this proceeding when Special Administrative Law Judge Morrissey selected him to perform an independent medical evaluation. In his report dated November 22, 1995, Dr. Bieri indicated claimant's back injury was consistent with a soft-tissue injury at the L2-3, L3-4, and L4-5 intervertebral levels. He believed claimant had an 18 percent whole body functional impairment as a result of his injuries and should restrict his work to the light physical demand level. Unfortunately, Dr. Bieri's report did not contain an opinion regarding task loss.

Because Dr. Bieri appears to be disinterested in the outcome of this litigation and there appears to be no valid reason to question his opinions, the Appeals Board is persuaded by the doctor's testimony that claimant has sustained an 18 percent whole body functional impairment and claimant should be restricted to light work. Therefore, the Appeals Board finds claimant is not permanently and totally disabled as a result of his back injury.

Because his is an "unscheduled" injury, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e which provides in pertinent part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The task loss prong of the formula for permanent partial general disability benefits contained in K.S.A. 44-510e requires the opinion of a physician. However, Dr. Bieri, the

physician whom the Appeals Board believes is the most accurate regarding claimant's post-injury abilities, did not provide an opinion regarding the number, or percentage, of tasks claimant can no longer perform as a result of the back injury. The Appeals Board is convinced claimant has lost a portion of the work tasks he performed during the 15-year period before the August 1994 accident. Therefore, claimant's task loss lies somewhere between Dr. Eyster's zero percent task loss and Dr. Zimmerman's 100 percent task loss. Accordingly, the Appeals Board averages those percentages and finds claimant has a 50 percent task loss for purposes of this award.

As claimant is presently not working, the Appeals Board finds claimant has a 100 percent difference in his pre- and post-injury average weekly wage. Respondent has neither offered claimant employment nor vocational rehabilitation services to assist him in finding work. Should claimant return to the work force in the future, either through his own efforts or through assistance from the respondent and its insurance carrier, the parties may request review and modification of the award as provided by statute.

As required by K.S.A. 44-510e, the Appeals Board averages the 50 percent task loss with the 100 percent difference in average weekly wage and finds that claimant has a 75 percent permanent partial general disability as a result of the August 1994 work-related accident.

Respondent and its insurance carrier argued that claimant's task loss could not exceed 10 percent because he could allegedly continue to operate heavy equipment which formerly comprised approximately 90 percent of his workday. The Appeals Board disagrees with that analysis. As indicated by respondent's vocational rehabilitation expert, Richard Santner, the job of heavy equipment operator required greater physical effort than that of light work and was generally considered to fall within the medium physical demand level as defined by certain government publications.

Respondent and its insurance carrier also argued the Appeals Board should impute a wage to claimant since he was drawing social security disability benefits and not looking for employment. Respondent did not provide claimant with accommodated employment and did not provide vocational rehabilitation services to attempt to return claimant to work. Furthermore, under the facts presented, the Appeals Board finds that claimant was not attempting to wrongfully manipulate his workers compensation claim. Therefore, the public policy considerations set forth in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), do not dictate that a post-injury average weekly wage is to be imputed for purposes of the wage loss prong of K.S.A. 44-510e.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated January 30, 1997, entered by Special Administrative Law Judge William F. Morrissey should be, and hereby is, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Paul D. Martinitz, and against the respondent, Martin Marietta Aggregates, and its insurance carrier, CIGNA, for an accidental injury which occurred August 29, 1994, and based upon an average weekly wage of \$719.41 for 34.86 weeks of temporary total disability compensation at the rate of \$319 per week or \$11,120.34, followed by 278.62 weeks at the rate of \$319 per week or \$88,879.66, for a 75% permanent partial general disability, making a total award of \$100,000.

As of August 11, 1997, there is due and owing claimant 34.86 weeks of temporary total disability compensation at the rate of \$319 per week or \$11,120.34, followed by 119.14 weeks of permanent partial compensation at the rate of \$319 per week in the sum of \$38,005.66 for a total of \$49,126, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$50,874 is to be paid for 159.48 weeks at the rate of \$319 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frederick J. Patton, II, Topeka, KS  
Gary R. Terrill, Overland Park, KS  
Bryce D. Benedict, Administrative Law Judge  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director